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No. 98-276

In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY and VICKIE MAYBERRY,

Petitioners,

vs.

JANET KATHLEEN WAGNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	1
Statement of the Case	1
A. Procedural History	1
Reasons for Denying the Writ	5
I. There Is Substantial Authority Indicating That When A State Court Action Is Filed There Is No Denial Of "Meaningful Access To The Court" And A § 1983 Action Cannot Be Sustained. ..	5
II. A § 1983 Cause Of Action For "Denial Of Access To The Courts" Requires That The Concealment Of The True Facts Be Over A Significant Period Of Time.	10
III. The Ninth Circuit Misapplied The Prerequisites Of A § 1983 Action And Suggested A Wholly Unworkable Solution.	12
IV. The Right To Meaningful Access To The Courts Does Not Guarantee A Full And Complete Investigation By A State Governmental Agency.	14

Page

V. The Respondent, Janet Wagner, Did Not Act Under Color Of State Law And The Complaint Does Not Properly Allege A Conspiracy Against Her To Bring Her Within The Purview Of § 1983. 17

Conclusion 21

TABLE OF CITED AUTHORITIES

Cases:

Andrews v. Fowler, 98 F.3d 1069 (8th Cir.1996), *cert. denied*, 116 S. Ct. 1545, 517 U.S. 1156, 134 L. Ed. 2d 648 (1996) 9, 11

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 10, 11, 16

Bolden v. Ramos, 1996 U.S. Dist. LEXIS 1544, 1996 WL 66135 (N.D. Ill, Feb. 13, 1996) 16

Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142 (1907) 14, 15

Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 974 (1990) 5

Fisher v. City of Cincinnati, 753 F. Supp. 681 (S.D. Ohio 1990) 10

Flagg Bros. v. Brooks, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978) 17

Table of Cited Authorities

	Page
Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990)	16
Gomez v. Whitney, 757 F.2d 1005 (9th Cir. 1985)	4
Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds sub nom; Hanrahan v. Hampton,* 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980)	4
Hinckle v. City of Clarkburg, 81 F.3d 416 (4th Cir. 1996)	9
Horton v. California, 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990)	5
In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995)	10
Joyce v. Mavromatis, 783 F.2d 56 (6th Cir. 1986)	7, 8
Kernats v. O'Sullivan, 35 F.3d 1171 (7th Cir. 1994)	12
Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980)	9
Lessman v. McCormick, 591 F.2d 605 (10th Cir. 1979)	12
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983)	10, 11

Table of Cited Authorities

Page

Searcy v. City of Dayton, 38 F.3d 282 (6th Cir. 1994) . 17

Singer v. Wadman, 595 F. Supp. 188 (D. Utah 1982), *aff'd*, 745 F.2d 606 (10th Cir 1984) 4

Swekel v. City of River Rouge, 119 F.2d 1259 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998) 5, 6, 7, 21

Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063, 131 L. Ed. 2d 556, 115 S. Ct. 1692 (1995) 8, 16

United States v. Price, 383 U.S. 787, 16 L. Ed. 2d 267, 86 S. Ct. 1152 (1966) 17

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995), *reh'g denied, cert. denied*, 134 L. Ed. 2d 648, 116 S. Ct. 1545 (1996) 8, 10, 11, 12, 14, 16

Wolff v. McDonnell, 418 U.S. 539, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) 15

Woodrum v. Woodward County, 866 F.2d 1121 (9th Cir. 1989) 2

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... *passim*

Table of Cited Authorities

	Page
Nev. Rev. Stat. Ann. @ 484.219 (1997)	19
Nev. Rev. Stat. Ann. @ 484.223	19
United States Constitution:	
Article IV, section 2, paragraph 1	15
First Amendment	1
Fifth Amendment	1
Fourteenth Amendment	1

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 143 F.3d 1219 and is reprinted in the Appendix to Petitioner's Petition for Writ of Certiorari [hereinafter "Pet.App."] at pp. 1a to 9a. The order of the United States District Court for the District of Nevada, CV-S-97-090-PMP(LRL) dismissing Petitioners' complaint is unreported and is reprinted at Pet.App. 10a to 12a.

JURISDICTION

The Petitioner and Cross-Petitioners have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioners, in their Complaint, assert the First, Fifth and Fourteenth Amendments of the United States Constitution as the basis for the right of meaningful access to the Court. They have claimed a violation of their civil rights pursuant to 42 U.S.C. § 1983. These provisions are found in the Petition for Writ of Certiorari filed by Petitioners and will not be delineated here.

STATEMENT OF THE CASE

A. Procedural History

On November 10, 1994, Janet Wagner was sued in Clark County District Court (State of Nevada) by the DeLews for the wrongful death of Erin DeLew. Erin DeLew died as the result of an automobile/bicycle accident that occurred on September 27, 1994. That action is still viable and scheduled for trial in Clark County District Court in February of 1999.

A subsequent action (the instant action), filed on September 26, 1996, asserted a 42 U.S.C. § 1983 civil rights violation against the investigating officers of the automobile/bicycle accident and a conspiracy claim against Janet Wagner (Respondent Wagner). The case was removed to Federal Court and Janet Wagner moved to be dismissed from the action.

On April 3, 1997, Judge Philip M. Pro granted Respondent Wagner's motion to dismiss the § 1983 complaint. A conspiracy action against a civilian under 42 U.S.C. § 1983 must allege specific facts to show an agreement and must show that an actual deprivation of constitutional rights resulted from the alleged conspiracy. *Woodrum v. Woodward County*, 866 F.2d 1121 at 1126 (9th Cir. 1989). 42 U.S.C. § 1983 does not apply to all conspiratorial tortious interferences with the rights of others, but only those in which the Petitioners have alleged that the Respondents agreed to commit an unlawful act. The District Court, *sue sponte* also dismissed the action against the investigating officers.

During the course of discovery in the original State Court action against Janet Wagner the DeLews have been allowed free, complete and total access to the accident investigation and facts surrounding this accident. At no time have they been denied information concerning the details of the accident or the investigation that followed. Each officer involved in the investigation testified at length (most for a full day) in deposition about his involvement, about his training and about the procedures for conducting a fatal accident investigation. Each has testified about his contact with Mrs. Wagner, her husband's non-involvement in the investigation and the details concerning their perception of her and her conduct at the accident scene. Cross-Pet.App. pp. A-1 to A-10.

The Petitioners have not only had full access to the complete laboratory reports concerning Mrs. Wagner's blood/

alcohol, but, over the objections of the Respondent Wagner, they had the remaining blood sample submitted to their own independent laboratory for analysis.

Despite the fact that the trial judge in the wrongful death action has indicated that the Petitioners would be allowed to explore the role of the traffic investigators, the Petitioners realize that all evidence points to the culpability of the bicyclist, Erin DeLew. Unless they can put the police on trial in the same case there is little chance for the Petitioners to prevail in an automobile negligence action.

Even though the original wrongful death action remains viable and is scheduled for jury trial, the DeLews brought this second action claiming that they have been deprived of "meaningful access to the courts." The only method to obtain jurisdiction over Janet Wagner in the § 1983 action is to allege a conspiracy. However, the DeLews' complaint is deficient.

The complaint against Janet Wagner lacked each of the foregoing items and she moved to dismiss that action on the grounds that (1) it was an improper splitting of actions and (2) she was an improper party in a civil rights action.

On appeal to the Ninth Circuit, the Court rejected Janet Wagner's argument that she was an improper party with the observation:

> In support of their conspiracy claim, the DeLews allege that Janet Kathleen Wagner left the accident scene during the investigation and that LVMPD and NHP officers permitted Wagner to do so.[1]

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1. The information concerning Mrs. Wagner's leaving the scene during the accident investigation comes from Mrs. Wagner's deposition wherein she indicated that she accompanied by two officers to her home nearby to use the bathroom. Deposition of Janet Wagner pp. 145-147. Cross-Pet. App. A-11 to A-13.

> Construing these facts in a light most favorable to the DeLews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae DeLew's death and thereby deprive the DeLews of their right of access to the courts. Pet.App. p. 8a, 9a

In a precedent setting decision the Ninth Circuit (for the first time) ignored the requirement (1) that there must be a violation of an underlying civil right, and ignored the requirement (2) that there must be an allegation that the defendants agreed to commit an unlawful act as thresholds for stating a cause of action for denial of meaningful access to the courts. *Hampton v. Hanrahan,* 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds sub nom; Hanrahan v. Hampton,* 446 U.S. 754, 64 L. Ed. 2d 670, 100 S. Ct. 1987 (1980); *Singer v. Wadman*, 595 F. Supp. 188 at 270 (D. Utah 1982), *aff'd,* 745 F.2d 606 at 609 (10th Cir 1984).

The Ninth Circuit has recognized inadequate investigation as sufficient grounds to state a civil rights claim only when there was another recognized constitutional right involved. That is when a party claiming the denial of meaningful access to the courts has been denied a constitutionally protected right he may have grounds to assert a denial of meaningful access to the courts. *Gomez v. Whitney*, 757 F.2d 1005 (9th Cir. 1985)(the Court found no instance where the courts have recognized inadequate investigation as sufficient to state a civil rights claim unless there was another recognized constitutional right involved).

Although the Ninth Circuit determined that the DeLews' § 1983 action for improper and inadequate investigation of a traffic accident was premature, it ruled that the action should not have been dismissed with prejudice and ordered it remanded to be dismissed without prejudice.

REASONS FOR DENYING THE WRIT

I.

THERE IS SUBSTANTIAL AUTHORITY INDICATING THAT WHEN A STATE COURT ACTION IS FILED THERE IS NO DENIAL OF "MEANINGFUL ACCESS TO THE COURT" AND A § 1983 ACTION CANNOT BE SUSTAINED.

The First, Fifth, Sixth, Seventh and Eighth Circuits have recognized that a plaintiff who has filed a viable State Court action has not been denied "right-of-access-to-the courts." In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. denied,* 496 U.S. 974 (1990), abrogated on other grounds by *Horton v. California,* 496 U.S. 128, 110 L. Ed. 2d 112, 110 S. Ct. 2301 (1990), the plaintiff's claim for denial of meaningful access to the courts arose out of an illegal seizure and removal of property from the state. While the Circuit Court recognized the hardship which had been placed upon the plaintiffs in litigating their claim in a foreign jurisdiction, it simply stated:

> Although we agree that the removal of the seized property to Arkansas may have complicated, in some way, the Crowders' efforts to use the Texas judicial system to test the legality of the search and seizure or to recover the property, we cannot agree that the defendants' actions violated the Crowders' constitutional right of access to the courts. *Id.* at 813-14.

In its decision in this case the Ninth Circuit referenced the case of *Swekel v. City of River Rouge*, 119 F.2d 1259 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 690 (1998) and suggested that "meaningful access to the courts is denied when a party engages in pre-filing actions which effectively covers-up evidence. Pet.App p. 8a. However, as pointed out in the DeLew petition, (at p. 9, n.5)

the referenced language is merely dicta in the *Swekel* case. The *Swekel* Court ultimately held that the plaintiff could not bring a § 1983 action despite the fact that the police engaged in an immediate cover up of the second driver (the son of a high-ranking police officer) by failing to perform forensic tests on Mr. Swekel's clothes, ignoring the responding officer's report that two cars were involved; telling the responding officer not to attend the preliminary hearing, ignoring anonymous tips implicating the police officer's son, refusing to interview the police officer's son, and failing to disclose the tips to the plaintiff. The Sixth Circuit indicated that there was no showing that the plaintiff had been denied "access to the court" because she had not attempted to pursue a state court action.

The Sixth Circuit went on to state that when the plaintiff knows the identity of the defendant, has filed a state court action for damages and is aware of the alleged police cover up there is no § 1983 claim for denial of meaningful access to the courts. Specifically the Court observed:

> First, a court must ascertain whether the abuse occurred pre- or post-filing. When the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the abuse, and thus, an access to courts claim typically will not be viable. If the abuse occurs pre-filing, then the plaintiff must establish that such abuse denied her "effective" and "meaningful" access to the courts. *Bounds*, 430 U.S. at 822. She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had. *See Crowder*, 884 F.2d at 812-13; Bell, 746 F.2d at 1261; Ryland, 708 F.2d at 974-75. In most instances, state courts can address pre-filing abuses by tolling the statute of limitations

> or allowing for a "spoliation of evidence" lawsuit. *Id.* at 1263-64.

Although the *Swekel* Court went to great lengths to distinguish its opinion in *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) it nevertheless held that

> [b]efore filing an "access to court" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is the court to assess whether such access was in fact "effective" and "meaningful"?

Swekel v. City of River Rouge, *supra*. at 1264. The implication is that if in attempting to gain access to the State Court the plaintiff is successful and is allowed to pursue his action, then a § 1983 "access to the courts action" will not lie.

In the concurring opinion in *Swekel*, Judge Merritt points out some of the pitfalls of such cases and offers a workable remedy:

> The standard for a "right-of-access-to-the-courts" claim, whether treated under the First Amendment as part of the right "to petition the government for a redress of grievances" or as a procedural due process claim, should require that the plaintiff allege and prove that the state's judicial process does not provide fair procedures to remedy the wrong alleged. Proof of the lack of adequate state remedies is required by *Hudson v. Palmer*, 468 U.S. 517, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), in procedural due process cases and should be required in judicial access cases. It seems elementary that the federal right of access to the courts is not abridged when the state courts remain just as open to provide a remedy as the federal courts.

The guidelines and insight in *Joyce v. Mavromatis*, *supra* provide specific direction in this case. In *Joyce*

> [t]he plaintiff knew the identity of the defendant, had a pending state court damage suit when the actions occurred, and could bring these allegations to the attention of the state court judge. Thus, the defendants did not deny her access to the courts, because she had all of the relevant facts at her disposal.

Id. at 57.

In the instant case the Petitioners, like those in *Joyce*, knew the identity of the Respondent Wagner, had a pending State Court damage suit and the State Court has already ruled that the Petitioners will be allowed to explore their allegations of wrongdoing by the police department. Cross-Pet.App. pp. 7a. A party who files a timely action in State Court, who is allowed to proceed with discovery and who can bring the investigation to the attention of the State Court judge has meaningful access to the courts.

In the case of *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 514 U.S. 1063, 131 L. Ed. 2d 556, 115 S. Ct. 1692 (1995) the Seventh Circuit refused to extend the parameters of § 1983. In *Thompson*, the plaintiff claimed the police used excessive force and denied him access to the courts by omitting critical facts in their police reports. *Id.* at 852. The Seventh Circuit held that the defendants' actions did not amount to a denial of the plaintiff's right to access the courts because the plaintiff was present at the scene, knew all of the facts, and had sufficient facts to promptly file a law suit. *Id.* at 852-53. *See also Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995).

The First Circuit has recognized that a conspiracy to cover up the use of excessive force by police officers does not give

rise to a § 1983 cause of action when the injured party is able to pursue an action for damages in State Court. *Landrigan v. City of Warwick*, 628 F.2d 736 (1st Cir. 1980). That court also held that when the plaintiffs are able to file a State Court action any claim of conspiracy or the mere filing of a false police report will not give rise to a § 1983 civil rights cause of action. *Id* at 745. The alleged actions of the police must result in some impediment to access to the state court.

In the case of *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir. 1996), the Eighth Circuit determined that although the plaintiff was raped by a police officer, the police investigation or lack thereof did not give rise to a separate cause of action.

> Andrews also appears to argue that she was injured by Price's failure to investigate her rape. We find this claim to be without merit. While Price's inaction after learning of Andrews' rape may be continuing evidence of his attitude of tacit authorization or failure to take remedial action, no further constitutional injury resulted to Andrews from this failure. Andrews never reported the incident herself and although she instructed her mother to "press charges," she did not inform her mother of the exact nature of the charge. Further, her mother decided not to pursue the matter. While Price's failure to investigate the rape may have violated state law and common sense, it did not rise to the level of a separate constitutional violation of Andrews' rights. *Id.* at 1078-79.

In *Hinckle v. City of Clarkburg*, 81 F.3d 416 (4th Cir. 1996), the plaintiffs claimed a conspiracy by police officers to deprive them of meaningful access to the courts. The Fourth Circuit Court of Appeals ruled that the evidence of conspiracy amounted to rank speculation and conjecture. The Court further

denied a claim for destruction of body parts after autopsy because there was a state remedy available to the plaintiffs.

The Circuit Courts that have dealt with § 1983 claims for interference with "meaningful access to the courts" have uniformly denied those claims when the facts are known to the plaintiff and when state courts are available in which to assert those facts.

II.

A § 1983 CAUSE OF ACTION FOR "DENIAL OF ACCESS TO THE COURTS" REQUIRES THAT THE CONCEALMENT OF THE TRUE FACTS BE OVER A SIGNIFICANT PERIOD OF TIME.

Where the courts have recognized a "denial of meaningful access to the courts" cause of action there has been a denial or concealment of the true facts over a significant period of time (*i.e.*, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261-62 (7th Cir. 1984) (holding that cover-up which caused a twenty-year delay violated plaintiffs' right of access to the courts); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), (holding that cover-up which caused an eleven-month delay stated a claim for a violation of plaintiffs' right of access to the courts); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 824 (S.D. Ohio 1995) (holding that cover-up which caused a twenty-two to thirty-four-year delay violated plaintiffs' right of access to the courts); *Fisher v. City of Cincinnati*, 753 F. Supp. 681, 686-87 (S.D. Ohio 1990) (holding that one-year delay violated plaintiff's right of access to the courts). *Cf. Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995), *reh'g denied, cert. denied,* 134 L. Ed. 2d 648, 116 S. Ct. 1545 (1996)(holding six-month delay insufficient to show a violation of plaintiffs' right of access to the courts).

Equally significant is the Court's recognition in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), that the cover up prevented the plaintiffs from seeking any type of redress through the courts. The plaintiffs total lack of information concerning the true nature of events acted to prevent them from seeking redress through the courts. In explaining its decision in *Bell*, the Seventh Circuit recently stated,

> the cornerstone of our decision in Bell was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access.

Vasquez v. Hernandez, 60 F.3d at 329. In *Andrews v. Fowler*, 98 F.3d 1069 (8th Cir.1996), *cert. denied,* 116 S. Ct. 1545, 517 U.S. 1156, 134 L. Ed. 2d 648 (1996), the Court deemed the "inadequate investigation" claim to be insignificant despite the passage of time because the plaintiff did little to pursue the claim.

The true test is two fold: (1) the prevention of full and open disclosure of facts crucial to the cause of action and (2) rendering hollow the plaintiffs' right to access to the courts. If either of the foregoing is missing there is no § 1983 denial of access to the courts.

In this action the Petitioners have had both open disclosure of the facts and meaningful access to the State Court.

III.

THE NINTH CIRCUIT MISAPPLIED THE PREREQUISITES OF A § 1983 ACTION AND SUGGESTED A WHOLLY UNWORKABLE SOLUTION.

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." This second element requires that the plaintiff show the defendant acted "under color of law."

Lessman v. McCormick, 591 F.2d 605 at 609 (10th Cir. 1979); *see also Kernats v. O'Sullivan,* 35 F.3d 1171, 1175 (7th Cir. 1994); *Vasquez v. Hernandez,* 60 F.3d 325 at 328 (7th Cir. 1995).

The Ninth Circuit's decision has effectively eliminated the requirement that the plaintiff be deprived of a constitutional right. The decision suggests that the plaintiffs may be able to make a future constitutional claim and therefore the District Court erred in dismissing the claim with prejudice. Not only is such a remedy unwarranted, there are no guidelines upon which to implement its decision.

The statute does not provide for a "potential" claim. The statute is specific:

> **Every person who**, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, **subjects, or causes to be subjected**, any citizen of the United States or other person within the jurisdiction thereof **to the deprivation of any rights, privileges, or**

> **immunities secured by the Constitution and laws, shall be liable** to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. [emphasis added].

The decision of the Ninth Circuit relieves the plaintiff of showing that it has been subjected to a deprivation of a constitutional right. The Ninth Circuit suggests that it will hold a claim for "denial of meaningful access to the court" in suspension pending a trial at the state court level. Not only is its solution fraught problems,[2] it offers no guidelines to the District Court for deciding if the trial at the state court action was meaningful. When significant factual defenses are available to the defendant in state court action, is the defendant guaranteed that it will face a § 1983 action should she prevail in the state court? What recourse is available if the plaintiff prevails but the jury verdict is obviously a compromise verdict and the plaintiffs are wholly dissatisfied? Is a plaintiff required to take an appeal in the state court action before the federal action becomes ripe? What § 1983 rights do the plaintiffs have if they prevail at the trial level but are overturned by the state appellate court? Can the trial judge even consider summary judgment?

Rather than resolve, simplify, minimize or eliminate litigation, the Ninth Circuit decision in this case actually fosters

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2. The Ninth Circuit solution to reserve ruling for another day essentially forecloses the any possibility of settlement; the plaintiff would be unwilling to settle considering that it might foreclose the pending § 1983 action and the defendant could not settle without insisting on a dismissal of the federal action.

it. This decision serves to encourage and promote § 1983 actions in all future cases in which a litigant is dissatisfied with the police investigation.

IV.

THE RIGHT TO MEANINGFUL ACCESS TO THE COURTS DOES NOT GUARANTEE A FULL AND COMPLETE INVESTIGATION BY A STATE GOVERNMENTAL AGENCY.

The District Court's decision to dismiss the § 1983 action was reversed because the Ninth Circuit determined that "[t]he Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Petitioner DeLew's Appendix to Petition at 8a. This court did observe in *Chambers* at 148 that

> [t]he right to sue and defend in the courts . . . must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the *Federal Constitution.* (interior cites omitted)

However, access to the courts does not guarantee a police investigation nor does "every [alleged] act of deception in connection with a judicial proceeding gives rise [to a constitutional action]." *Vasquez v. Hernandez,* 60 F.3d 325 at 329 (7th Cir. 1995) quoting from *Bell* at 1265.

The Petitions and Cross-Petitions which have been filed in this case evidence the fact that the Petitioners now have a viable active action pending in State Court.

In the *Chambers* case this Court was there dealing with guaranteeing to the petitioner "equal protection" under Article IV, section 2, paragraph 1, of the Constitution of the United States. *Id.* That decision upholds the State's right to define access to the courts when it does not discriminate between the citizens of the various states. The *Chambers'* Court did not extend its ruling to the amorphous quagmire of "adequate investigation." There is nothing suggested by this Court in *Chambers* that implies that the adequacy or inadequacy of a police investigation is embraced within "right to sue and defend." In fact, *Chambers'* holds that a citizen must be given the same access to the courts as "the citizens of all other States to the precise extent that it is allowed to its own citizens."

The right of access to the courts finds a constitutional basis in the due process clause, which "assures that no person will be *denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." Wolff v. McDonnell*, 418 U.S. 539, 579, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). The Seventh Circuit has suggested that the true criteria is whether the plaintiffs have been deceived into foregoing their legal remedies.

The critical factors missing from the present action are (1) the deprivation of a right, privilege, or immunity secured either by the Constitution or by federal law and (2) that the deprivation arose from one acting under color of state law. While the Petitioners claim that the police failed to properly investigate the accident, those assertions (while lacking evidentiary testimonial support) can be and are being presented and argued in the State Court action. The investigation has not prevented the Petitioners from seeking redress in the State Court, nor has it interfered with the ability to discover the alleged oversights. It should be noted that only where an investigation is part of a coverup, and where special circumstances exist under which the coverup results in a

plaintiff's inability to present a viable case in court, and where the coverup has been successful to some extent in denying a civil right may a § 1983 be invoked. In *Bell* the Seventh Circuit held that a successful twenty-year coverup of a police killing interfered with the due process right of access. 746 F.2d 1205. The *Bell* court specifically limited the holding to the "particularly egregious set of facts" presented in that case. *Id.* at 1264. More recently the Seventh Circuit cases have reached a different result. In *Vasquez* the Seventh Circuit reasoned that "the cornerstone of our decision in Bell was that the conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access." 60 F.3d at 329. The Court went on to dismiss Vasquez' denial of access claim, holding that where the actual circumstances surrounding the shooting were revealed publicly within six months of the incident, and plaintiffs were granted access to records of investigation of the incident/coverup, their constitutional rights "were ultimately preserved." *Id.* Similarly, in *Gibson v. City of Chicago,* 910 F.2d 1510, 1520 (7th Cir. 1990) the Circuit ruled that even where a plaintiff successfully alleges the filing of intentionally false and inaccurate reports, he cannot state a claim for denial of access to the courts without alleging some concrete injury to the decedent's survivors resulting from the alleged coverup. 910 F.2d at 1523-24; *see also Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994)(police officers who omitted information from police reports did not deny access to court, since facts known plaintiff were sufficient to enable him to promptly file the instant lawsuit, unlike Bell, "where the true facts were concealed thereby denying the plaintiffs the opportunity to file a lawsuit until some twenty years after the fact."); *Bolden v. Ramos,* 1996 U.S. Dist. LEXIS 1544, 1996 WL 66135 at *11 (N.D. Ill, Feb. 13, 1996) (Where plaintiff is aware of the alleged coverup when filing complaint, he was hardly deceived into forgoing legal remedies").

Once again, it should be apparent from the ongoing State Court litigation that nothing that happened during the police investigation at the time of the DeLew/Wagner automobile accident has deceived the Petitioners into foregoing their State Court legal remedies. That action is not only proceeding with all due diligence, but is currently set for trial on February 12, 1999.

V.

THE RESPONDENT, JANET WAGNER, DID NOT ACT UNDER COLOR OF STATE LAW AND THE COMPLAINT DOES NOT PROPERLY ALLEGE A CONSPIRACY AGAINST HER TO BRING HER WITHIN THE PURVIEW OF § 1983.

To prevail on a § 1983 claim, a plaintiff must establish: (1) that a person acting under color of state law (2) deprived the plaintiff of a right secured by the Constitution or laws of the United States. *See Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Flagg Bros. v. Brooks*, 436 U.S 149, 155, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978)). Thus, as a threshold issue, it must be determined whether Janet Wagner acted under color of state law.

Section 1983 actions may be brought to redress constitutional violations effected under color of state law. A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one's constitutional rights. *United States v. Price*, 383 U.S. 787, 794, 16 L. Ed. 2d 267, 272, 86 S. Ct. 1152 (1966).

> A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an

> agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage,' " *Rotermund v. United States Steel Corp.*, 474 F.2d 1139 (8th Cir. 1973) (citation omitted). *Bell* at 1255. The elements of a conspiracy claim include an agreement between the defendants to commit an unlawful act and an overt act inflicting the particular injury of which the plaintiff complains. *Hampton v. Hanrahan*, 600 F.2d 600, 620-24 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980). Although the law does not demand proof that each conspirator understood the limits of the illegal plan or the identity of all participants, it does require the existence of some "single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences." *Hoffman-LaRoche*, 447 F.2d at 875; *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) at 1255.

Respondent Wagner was a civilian, neither employed by or acting on behalf of any governmental agency. She was merely driving her personal vehicle home from work when a bicyclist suddenly crossed in front of her. There was nothing about the bicycle/automobile accident which is alleged to have comprised a conspiracy. Rather, following the accident, when the police arrived and started their investigation, it is alleged that a conspiracy took place.

The Ninth Circuit, in dressing Mrs. Wagner with "color of law" simply states:

> In support of their conspiracy claim, the DeLews allege that Janet Wagner left the accident scene during the investigation and that the LVMPD and NHP offers permitted Wagner to do so.

The Court appears to ignore the requirement that there be "a combination of two or more persons acting in concert **to commit an unlawful act**, or to commit a lawful act by unlawful means." In this case, as indicated in Respondent Wagner's deposition (Cross-Petition Appendix B, pp 10a-15a.), she was escorted to a bathroom since there was not one at the accident scene. Certainly there is nothing illegal about (1) being escorted from an accident scene or (2) using the bathroom during an accident investigation. In fact, with an officer's permission, there is nothing illegal about leaving the scene of an accident after the investigation has commenced.[3]

Even construing the facts in a light most favorable to the DeLews, there is no inference that "leaving the scene of the accident" was an illegal act. It stretches even the most speculative imagination to infer that the use of the bathroom

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3. Nev. Rev. Stat. Ann. @ 484.219 (1997) provides :

> 484.219. Duty to stop at scene of accident involving death or personal injury; penalty 1. The driver of any vehicle involved in an accident on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of NRS 484.223.

NRS 484.223 provides:

> 1. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle or other property which is driven or attended by any person shall:
>
> (a) Give his name, address and the registration
>
> (Cont'd)

somehow played a role in denying the DeLew's access to the courts.

Respondent Wagner is not the spokesperson for the investigating agencies. The testimony of each of the investigating officers has been taken in deposition. That testimony should be taken at face value. That testimony does nothing to implicate Respondent Wagner in any kind of conspiracy. She was fully cooperative and complied with every request made. Only the most creative stretch of the imagination can provide any type of supposition which would cloak Janet Wagner with the "color of law" essential to impose § 1983 jurisdiction over her.

The facts alleged in the complaint do not constitute either an illegal act or the nexus for a conspiracy. The facts alleged against Respondent Wagner neither state nor imply an attempt to interfere with the Petitioners' civil rights. No cause of action is stated against Respondent Wagner.

(Cont'd)

> number of the vehicle he is driving, and shall upon request and if available exhibit his license to operate a motor vehicle to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in such accident;
>
> (b) Give such information and upon request manually surrender such license to any police officer at the scene of the accident or who is investigating the accident; and
>
> (c) Render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary, or if such carrying is requested by the injured person.

CONCLUSION

The DeLews' Petition for Writ of Certiorari is deficient in seeking relief from the Ninth Circuit in that the remedy granted to the DeLews is beyond the jurisdictional scope of 42 U.S.C. § 1983. The Ninth Circuit failed to recognize an existing wrong, but accepted jurisdiction in the event that a future wrong might be stated. The Ninth Circuit neither provided guidelines or standards for determining the basis of a future wrong and ignore rulings in other jurisdictions directly on point including the ruling in a case relied upon by it (*Swekel v. City of River Rouge*, 119 F.2d, 1259 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 690 (1998).

There is no basis in fact, law or pleadings upon which to vest the United States District Court with § 1983 jurisdiction over Janet Wagner. The Petitioners have not been denied due process or a constitutionally protected right, they have had full access to the State Court, and Respondent Wagner cannot be assumed to have been involved in a conspiracy.

It is respectfully requested that the DeLews' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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